

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	File# 04-56554
)	
NATIONAL TREASURY EMPLOYEES)	
UNION, Chapter 274)	
)	
and)	
)	John Remington,
FEDERAL DEPOSIT INSURANCE)	Arbitrator
CORPORATION)	
)	
)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the Employer's alleged violation of a Memorandum of Understanding concerning the non-selection of employee Patrick Tommins for Corporate Success Award (CSA), selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and through the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 15, 2005 in New Hope, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented by the parties; no stenographic transcription of the proceedings

was taken; and the parties elected to file post hearing briefs that were subsequently received by the Arbitrator on July 18, 2005.

The following appearances were entered:

For the Employer:

David M. Swiss

Counsel, Corporate Affairs Section
Kansas City, MO

For the Union:

Dianna L. Anderson

Assistant Counsel
Denver, CO

THE ISSUE

DID THE EMPLOYER VIOLATE THE PARTIES' MEMORANDUM OF UNDERSTANDING DATED 3/13/03, AND/OR ABUSE ITS DISCRETION WHEN IT DECLINED TO GRANT GRIEVANT PATRICK J. TOMMINS A CORPORATE SUCCESS AWARD (CSA) IN 2004 AND, IF SO, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS

MEMORANDUM OF UNDERSTANDING BETWEEN FDIC & NTEU (DATED 3/13/03)

1. CSA's will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and FDIC Circular 2420.1.
2. The Employer agrees to provide data to NTEU in an electronic spreadsheet on bargaining unit Corporate Success Award (CSA) recipients in 2004 and 2005 (based on contributions made in 2003 and 2004, respectively) that will include the following fields: division/office, position title, pay plan, job series, grade, region, duty station, gender, race/national origin and age (date of birth).

3. If the data for one or more groups included in the fields identified in #2, above, indicates a rate of distribution that is less than 80% of the distribution rate for the group with the highest rate in that field, the FDIC and the NTEU will conduct a joint review of the approved awards to determine if these results can be justified by a legitimate business reason or explained by the size(s) of the group(s) being compared. However, this joint review process does not waive the right of the Union or any employee to seek remedial relief in any appropriate legal forum.
4. Any grievances filed over the failure to receive a CSA will be filed under an expedited grievance procedure, under which the parties agree to waive Step One of the negotiated grievance procedure.
5.
6.
7.

CHAPTER 11

CORPORATE SUCCESS AWARDS

11.1 . Definition

The Corporate Success Award is an annual award that provides for a 3.0 percent increase in basic pay (in addition to the annual Pay Adjustments) for those employees who are recognized as the top contributors within the Corporation. The purpose of this award is to recognize an employee's individual initiative, exceptional effort and/or achievements that reflect important contributions to the Corporation and/or its organizational components. An employee recognized with this award will have made important contributions that are within or outside of the scope of his/her job; however, when within the scope of the employee's job, such contributions must reflect initiative, effort or achievement beyond that normally expected from an employee in that position and grade.

This award is effective for 2004 and 2005 and will be implemented during the first full pay period of each year, respectively. These awards will be issued on an annual

basis to acknowledge contributions made during the year. Corporate Success Awards will be distributed to employees in a fair and equitable manner.

11-2. Eligibility

All non-executive employees who have current ratings of record from the FDIC of “Meets Expectations” are eligible. Individuals, not teams, are eligible for the Corporate Success Award.

11-3. Relationship to Other Awards

Corporate Success Awards are not intended to replace existing incentive awards. However, the receipt of another type of award during the preceding year does not necessarily mean the employee will be nominated to receive a CSA.

11-4. Criteria

- A. **Business Results:** Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the Corporation and/or its organizational components.
- B. **Competency:** Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.
- C. **Working Relationships:** Builds extremely productive working relationships with co-workers, other Divisions/Offices. Or other public or private sector agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.
- D. **Learning and Development:** Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

BACKGROUND

There is little dispute over the relevant facts surrounding this dispute. The Federal Deposit Insurance Corporation (FDIC), hereinafter referred to as the “AGENCY” or “EMPLOYER,” is an Agency of the United States Government and a federal employer within the meaning of Section 7103, Title 5 of the U.S. Code. Examiners employed within the Agency’s Division of Supervision and Consumer Protection Field Offices are represented by the National Treasury Employees (NTEU) and its Local 274, hereinafter referred to as the “UNION.”

Patrick Tommins, the Grievant, has been employed by the Agency for approximately twenty-one (21) years and has been assigned as a Grade 12 Examiner since 1997. Grievant received a “Meets Expectations” rating for 2003 and applied to be considered for a CSA based on his 2003 performance. Grievant did not receive a CSA in 2004. Indeed, it was first revealed at the arbitration hearing that he was not nominated for the award by his immediate Supervisor, Chris Drown. Drown was not called to testify at the hearing.

When Grievant learned that he had not been selected for a CSA based on his 2003 performance, he filed a “Grievance” on March 24, 2004 alleging that “despite Grievant’s major impacts to the productivity and organizational results of the FDIC” and that his contributions during 2003 “warranted his receipt of a CSA”, he had been denied such an award in “breach of Circular 2420.1, Article 18 of the Nationwide Agreement between the Union and the FDIC” and in violation of Article II Part C of the 2003-05 Compensation Agreement between the FDIC and the Union. In remedy, the grievance requests:

1. That he be awarded a CSA for 2004 for his work in 2003 and that such award, with interest, be retroactive to January 1, 2004
2. For such other relief as is proper under the circumstances.
3. A step Two Hearing with oral presentation should be set for this case within 10 working days from the date the FDIC provides undersigned steward with responses to the Information Request that is being filed in connection with this Grievance.
4. All attorneys' fees.
5. All other remedies allowed by law.

The above referenced oral presentation was heard through a conference call on April 14, 2004. The Employer's Step Two response denying the grievance was then issued on April 23, 2004 by Regional Director Ronald F. Bieker. This response states, in relevant part:

I do not find sufficient information in the record, nor did I find any additional information from the grievance presentation, that would warrant granting a CSA to you.

You have not shown any specific violation of Circular 2420, Chapter 11. At no point during the grievance process have you provided any evidence that you should have received a CSA because your contributions were more significant than another bargaining unit CSA recipient. The CSA is a comparative process. The Division was responsible for comparing the value of contributions for each DSC employee in his or her position.

.....

Your grievance and the requested remedies are denied.

Grievant appealed the above denial in a letter to FDIC Associate Director Michael L. Jackson on April 19, 2004. This letter notes, in significant part, that Bieker's denial letter makes it clear that "the CSA is a comparative process, and at no point during the grievance procedure have you (grievant) provided any evidence that you should have received a CSA because your contributions were more significant than another bargaining unit CSA recipient." Grievant then asserts:

In the Step 2 decision, Mr. Bieker relied upon the NTEU's inability to provide additional information during the grievance presentation to justify why I should have been granted a CSA. However, as I stated during the grievance presentation, the Corporation has denied NTEU's request for the necessary and relevant information.....the CSA process is a comparative one and thus, without the comparative data NTEU seeks, I am prevented from comparing my contributions with the bargaining unit CSA recipients.

Jackson denied the grievance at Step 3 again noting that the CSA "is a comparative process" and that Grievant "did not show where your contributions were more significant than those of an approved nominee." Upon receipt of this denial the Union invoked arbitration pursuant to the provisions of Article 47 of the parties' collective bargaining agreement. There being no dispute concerning the timeliness of the grievance or the manner in which it was processed, this matter is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Union takes the position that the CSA criteria were not fairly and equitably applied to Grievant's 2003 contributions to the Agency resulting in Grievant not being granted a CSA award in 2004. The Union's argument in this regard relies significantly

upon its contention that the Agency's refusal to provide certain requested documentation prevented Grievant from effectively comparing himself with other applicants, a comparison required by the CSA process. Accordingly, the Union urges that the Arbitrator draw an adverse inference from the Agency's refusal to provide the requested information. Specifically, the Union argues that it must be inferred that if Grievant's supervisors had fairly applied the criteria, Grievant would have been nominated and accorded the same treatment as other nominees who received the award. The Union maintains that the above requested information was directly relevant to the main issue in this dispute: whether or not the Employer fairly applied the CSA criteria. In remedy, the Union takes the position that Grievant must be retroactively granted a CSA award for 2004.

The Employer takes the position that the Grievant was unable to demonstrate that, on a comparative basis, he was more deserving than any other employee who received the CSA award for 2004, and that the burden is on the employee to demonstrate a favorable comparison. Further, the Employer maintains that there was no evidence that the Employer abused its discretion in making the determination that Grievant should not receive a CSA award in 2004. The Employer contends that the "fair and equitable requirement" applies to the process used to distribute the awards, and not to each individual award. The Employer further takes the position that the Union is not entitled to an adverse inference on its claim that the Agency failed to provide sufficient documentation for Grievant to make appropriate comparisons prior to the arbitration. Finally, the Employer argues that even if the Arbitrator finds in favor of the Grievant, the remedy is limited.

DISCUSSION, OPINION AND AWARD

A critical threshold issue in this dispute is the Union's request that the Arbitrator draw an adverse inference from the refusal of the Agency to provide requested data concerning the contributions of CSA nominees and recipients. As the Grievant and Union have consistently argued from the inception of this grievance, if the process is comparative as the Agency maintains, then Grievant must be provided with relevant factual information regarding other comparable employees to determine whether or not his contributions are equal or superior to those of successful applicants. Indeed, it is extremely difficult, if not impossible, for the Arbitrator to determine if the award criteria were fairly and equitably applied in Grievant's case absent meaningful factual information concerning the relative contributions of those who were nominated and those whose names were not advanced. The record of the hearing reveals that Grievant is, and has been, a competent employee who was eligible for CSA nomination based on his "Meets Expectations" performance rating in 2003. According to documentation prepared by Chris Drown, his immediate supervisor, Grievant had a "good year" in 2003 performing "all aspects of the field office's responsibilities" including, but not limited to, serving as a member of the regional CDAC, working as an Acting Supervisor, serving as the "coach" of a junior employee and qualifying as a Subject Matter Expert. Grievant's successful performance in 2003 was generally confirmed by the testimony of second level supervisor Steve Flaten who testified that Grievant was a "good employee" who had

received favorable commentary on his performance evaluation.¹ In summary, it would appear that, based on the record and the above referenced Chapter 11.4 Criteria, Grievant was, at the very least, a suitable candidate for nomination for a CSA. Further, based on the credible testimony of Scott Duffney, a retired Union representative and bank examiner who was Grievant's co-worker in 2003, together with redacted Corporate Success Award Nomination forms of successful nominees (Joint Exhibit 15A-M), it is readily apparent that Grievant's contributions equaled or exceeded those of at least three other nominees from the Region who were ultimately awarded CSA's in 2004.

There can be little doubt that the refusal of the Agency to provide comparative information both prevented an independent review of Grievant's contributions and frustrated the grievance procedure. Simply asserting that a particular Grievant failed to prove that his contributions were not as significant as those of an award recipient is not a responsive answer to a grievance when it is the Employer that is in sole possession of the relevant information upon which this grievance answer was based. This is not to suggest that the Agency has limited discretion in evaluating the relative contributions of its employees. On the contrary, the Agency clearly has broad discretion to decide which employees will receive CSA's. However, it must be prepared to defend the exercise of this discretion in the grievance procedure, and ultimately in arbitration, when legitimate grievances are raised challenging whether or not the Agency has distributed CSA's in a fair and equitable manner as it agreed to do through collective bargaining. The Employer has the discretion to make judgments but it must be prepared to explain and defend those judgments. The Agency failed to do so both during the grievance procedure and at the

¹ Flaten was apparently unaware that Grievant had qualified as a Subject Matter Expert. Grievant's corroborated testimony to the contrary was un rebutted.

arbitration hearing itself. During his testimony, Flaten was unable to identify any specific reason why some employees were nominated while Grievant was not, and provided only vague and unresponsive answers to questions concerning the comparison of Grievant's contributions with those of nominated employees. Since Flaten was Grievant's Field Supervisor and not as familiar with Grievant's performance as the immediate supervisor (Drown) should have been, it is not surprising that he was unable to offer insight into Drown's decision not to nominate Grievant. However, since Drown did not testify, the Agency's explanation for its decision not to fairly and equitably consider Grievant amounts to little more than Flaten's testimony that he concurred with Drown's alleged decision not to nominate Grievant.

The crux of this dispute is the Agency's decision not to nominate Grievant. Since he was not nominated, Grievant was essentially denied access to the process which may, or may not, have resulted in his being selected for a CSA. While it is true that the fact that Grievant was eligible for a CSA does not automatically entitle him to receive one, it would clearly be an abuse of discretion to exclude him for non-meritorious or arbitrary reasons. Accordingly, it is this decision concerning nomination to which the fair and equitable standard must be applied. Unfortunately, there is nothing within the record to support the Agency's claim that this decision was simply the proper exercise of its broad discretion rather than arbitrary or capricious behavior. No documentation regarding the nomination process was presented, either during the grievance process or at the hearing, despite the fact that the Union clearly requested this information and the Arbitrator subsequently ordered the Agency to produce the documentation. This includes copies of any documents prepared, read, or considered by Drown to support the preliminary

nominations; copies of the nomination forms for all risk management bargaining unit employees in the Kansas City Region; and copies of any documents prepared in ranking nominations by the nominees supervisor or the Field Office supervisors. The limited documentation concerning successful nominees that was presented, while not conclusive, tended to support Grievant's contention that his contributions were as significant if not superior to those of at least three of the CSA recipients. The Arbitrator therefore has little alternative but to infer that the disputed documentation and/or the testimony of Drown would not have supported the position taken by the Agency.

Finally, in reviewing the arguments and relevant case law concerning this order, the Arbitrator is compelled to find that the Order to Compel Production of Documents issued in December of 2004 was proper within the meaning of Article 48 of the parties' collective agreement. Further, this Order was provided to the Employer in a timely manner.²

Comment is here warranted regarding the Employer's objection to the release of documents requested by the Union. The Employer argues that the documentation that it did provide was sufficient. As hereinabove noted, the Arbitrator was not persuaded by the Employer's arguments in this regard. The Employer further contends that it is prohibited by the Privacy Act from producing evaluative information because of the privacy interest each employee named on the ranking sheets has in nondisclosure. While this argument might have merit if the Union was requesting the names or other identifying data of the individuals being evaluated, providing redacted information similar to that provided for successful nominees in Joint Exhibits 15A-M would not

² The Arbitrator is fully in concurrence with the holdings of Arbitrators Goldman in NTEU, Chapter 49 and IRS (1986) and Gallagher in NTEU Chapter 274 and FDIC (2005).

appear to jeopardize the privacy interests of evaluated employees. This is so even though it is possible, as Duffney demonstrated during his testimony, that someone familiar with the workplace might occasionally be able to surmise the identity of an individual nominee. Finally, while the disclosure of personnel and similar files where such disclosure would involve the invasion of personal privacy is prohibited under the Freedom of Information Act, it is clear that, as the Union maintains, ranking materials which contain information about the contributions of employees do not implicate the personal privacy of supervisors. The Employer's argument in this latter regard must therefore be rejected.

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter including a careful reading of the thorough post hearing briefs submitted by the respective parties. Further, he is persuaded that the crucial issues raised at the hearing and in the briefs have been addressed above, and that certain other matters that arose in these proceedings must be deemed irrelevant, immaterial or side issues at the very most, and therefore have not been afforded any significant treatment, if at all, for example: whether or not the Corporate Success Awards were distributed to nominees in a fair and equitable manner; whether or not the procedures utilized by the Employer in determining the relative merits of the nominees were fair and equitable; whether or not Grievant attempted to compare himself with any specific bargaining unit employee in the Kansas City Region; the awards of Arbitrators Gootnick, Helburn, Feigenbaum, Kaplan, Goodstein, Talarico, Hooper, Strongin, Ross, Lumbley, or Lang; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and

concludes that with the specific facts of the subject grievance, and within the meaning of the parties' collective agreement the Union has established by a preponderance of the evidence that the Employer violated the Memorandum of Understanding of 3/13/03 and abused its discretion when it declined to nominate Grievant Patrick J. Tommins for a Corporate success award. Accordingly, an award will issue, as follows:

AWARD

THE AGENCY VIOLATED THE MEMORANDUM OF UNDERSTANDING AND ABUSED ITS DISCRETION WHEN IT DECLINED TO NOMINATE PATRICK J. TOMMINS FOR A CORPORATE SUCCESS AWARD FOR 2003. THE GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE GRANTED AN ADDITIONAL 3% INCREASE TO HIS BASE PAY AS SET FORTH IN I.L.C. OF THE PARTIES' 2003-05 COMPENSATION AGREEMENT.

The Arbitrator specifically rejects the Employer's contention that if the grievance is granted the Arbitrator must then select an employee who should not have received a CSA. The Arbitrator has no authority to substitute his judgment for that of the Agency by either determining that an employee should receive a CSA or that an employee should not receive this award. The above remedy should therefore not be interpreted as a CSA award to Grievant. Rather, it is a make whole remedy to the Agency's violation of the agreement and abuse of discretion in not nominating him for this award. Further, it is the Agency that has the discretion to determine what percentage of the bargaining unit will receive an award. While the Union agreed that the award would be limited to some percentage of the unit, the 33 1/3% figure was not negotiated but imposed by the Agency.

John Remington, Arbitrator

September 7, 2005

St. Paul, MN